No. 82-1616

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondents do not deny that the decision below conflicts with decisions of two other courts of appeals holding that Exemption 5 of the Freedom of Information Act protects confidential witness statements made in the course of military air crash safety investigations. See *Cooper* v. *Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); *Brockway* v. *Department of the Air Force*, 518 F.2d 1114 (8th Cir. 1975). Instead, respondents contend (Weber Br. in Opp. 10-20; Mills Br. in Opp. 5-17) that those decisions are no longer valid in light of *FOMC* v. *Merrill*, 443 U.S. 340 (1979).[1]

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[1]We note that this Court denied certiorari in *Cooper* following its decision in *Merrill*.

a. Respondent Weber Aircraft Corp. (Weber) maintains (Br. in Opp. 11, 13-14) that *Merrill* implicitly overruled *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), which recognized that statements such as those at issue here are privileged in civil discovery. In *Merrill*, the Court held (443 U.S. at 353-354) that under Exemption 5 of the FOIA, which protects documents normally or routinely privileged in the civil discovery context,[2] disclosure of privileged documents may not be denied simply because an agency "conclude[s] that disclosure would not promote the 'efficiency' of its operations or otherwise would not be in the 'public interest.' " Weber interprets this to mean that efficiency of government operations and the public interest no longer provide a valid rationale for any civil discovery privilege (Br. in Opp. 14). And since the *Machin* privilege is grounded upon such considerations (see Br. in Opp. 13), Weber concludes (Br. in Opp. 14) that "the *Machin* privilege is dead."

Weber's argument provides no grounds for denying certiorari. If there were any serious question about the continued validity of the important and widely accepted civil discovery privilege recognized in *Machin*, that would itself warrant review by this Court. However, the suggestion that *Machin* was silently overruled by *Merrill* is absurd. By holding in *Merrill* that Exemption 5 does not authorize nondisclosure under a "vague 'public interest' standard" (443 U.S. at 354), this Court merely reaffirmed that Exemption 5 applies only to documents normally privileged in civil discovery. The Court certainly did not question the continued validity of those civil discovery privileges that promote the public interest and government efficiency. Any

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[2]See *FTC* v. *Grolier Inc.*, No. 82-372 (June 6, 1983), slip op. 7; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-149 (1975).

such holding would undermine many civil discovery privileges, including the predecisional and attorney work product privileges, which this Court has held are incorporated into Exemption 5. *FOMC* v. *Merrill, supra*, 443 U.S. at 355; *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 150-154.

b. Respondents maintain (Weber Br. in Opp. 11-13; Mills Br. in Opp. 5-17) that even if the documents at issue in this case would normally be privileged in civil discovery, they are not protected by Exemption 5 because, as construed in *Merrill*, Exemption 5 incorporates only those privileges explicitly recognized in the legislative history. This argument also provides no grounds for denying review. First, in *Merrill* the Court expressly "d[id] not consider" whether Exemption 5 incorporates the *Machin* privilege (443 U.S. at 355-356 n.17), and respondents have provided no reason for believing that the courts of appeals that decided *Cooper* and *Brockway* would nevertheless decline to follow those decisions today.

Second, as explained in our petition (at 15-19), *Merrill* did not establish a rigid rule for determining whether a particular privilege is incorporated into Exemption 5.[3] The construction of *Merrill* adopted by the court below and defended by respondents—that Exemption 5 incorporates only those civil discovery privileges explicitly mentioned in the legislative history—would have far-reaching results. Any party in civil litigation with the government may seek to obtain documents both through discovery and by filing an FOIA request. The rule that Exemption 5 shields those

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[3]Contrary to respondent Mills' assertion (Br. in Opp. 5-6 n.1), *Merrill* did not characterize the *Machin* privilege as a "less plausible" privilege under Exemption 5. The Court merely considered the privilege for certain confidential commercial information to be the "most plausible" of the privileges asserted for the particular information at issue in that case (443 U.S. at 355-356).

documents not normally or routinely disclosed in civil discovery is meant to prevent civil litigants who are or would be denied discovery on grounds of privilege from obtaining the same documents under the FOIA. But if Exemption 5 of the FOIA incorporates only those privileges explicitly recognized in the legislative history, all other civil discovery privileges could be circumvented by filing an FOIA request and would therefore be effectively abolished in government litigation. There is nothing in *Merrill* to suggest that this Court intended such a startling result. And if such a result were intended, that would obviously be a matter of considerable importance that would merit clarification.[4]

Finally, as we explained in our petition (at 15-19), both the plain language of Exemption 5 and the legislative history show that Congress intended Exemption 5 to incorporate the *Machin* privilege. The support in the legislative history for this construction is as strong as the support for incorporation of the privilege for confidential commercial information recognized in *Merrill.*

2. Respondents' remaining arguments are insubstantial. Weber contends (Br. in Opp. 6-7) that the government failed to show that the statements at issue were made pursuant to promises of confidentiality. However, both courts below concluded otherwise. See Pet. App. 4a ("issue is whether Exemption 5 permits [nondisclosure of] statements of military personnel given under a promise of confidentiality * * *"); *id.* at 23a-24a. An uncontroverted affidavit filed

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[4]Just recently, this Court reiterated (*FTC* v. *Grolier Inc.*, No. 82-372 (June 6, 1983), slip op. 7-8 (emphasis omitted), quoting *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975) that " 'Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context.' " See also *Baldrige* v. *Shapiro*, 455 U.S. 345, 360 n.14 (1982). ("The primary purpose of the FOIA was not to benefit private litigants or serve as a substitute for civil discovery)".

in district court established that the statements were obtained under a pledge of confidentiality in the course of an authorized Air Force safety investigation. R. E. 42, Affidavit of Maj. Gen. Len C. Russell, Commander Air Force Inspection and Safety Center at 2. Contrary to Weber's assertion (Br. in Opp. 6-7), the applicable Air Force regulation (A.F. Reg. 127-4 (Jan. 1, 1973) (Pet. App. 31a-32a)) clearly established that such statements were privileged and confidential and were to be used "solely within the [Air Force] * * * to prevent accidents." And since at least 1963, the courts have recognized that it is the policy of the military services to make such promises of confidentiality. See *Machin* v. *Zuckert, supra*, 316 F.2d at 339.

3. Weber maintains (Br. in Opp. 7-8), without citing supporting authority, that any protection offered by Exemption 5 was waived because an Air Force employee inadvertently allowed Hoover's counsel to see portions of the documents during a deposition. But this claim was not raised in or decided by the court of appeals, and in any event "[a]n *unauthorized* disclosure of documents does not * * * constitute a waiver of the applicable FOIA exception." *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983); see also *Murphy* v. *FBI*, 490 F.Supp. 1138, 1142 (D.D.C. 1980); *Safeway Stores, Inc.* v. *FTC*, 428 F.Supp. 346, 347 (D.D.C. 1977).

4. There is also no merit in Weber's claim (Br. in Opp. 8-9) that certiorari should be denied because any promise of confidentiality made to Hoover was waived when he brought suit. This issue was not decided below, and the court of appeals required disclosure of Airman Dixon's statement as well as Hoover's (see Pet. App. 4a & n.4, 12a). Furthermore, the *Machin* privilege is intended not to benefit individual witnesses but to further a public and governmental interest in promoting military air safety.

Governmental promises of confidentiality would provide insufficient incentive for the necessary candor if witnesses feared that they could not later pursue their private rights in litigation without having their prior statements disclosed. This is clearly recognized in the regulation under which the statements at issue here were obtained. A.F. Reg. 127-4, *supra* (Pet. App. 31a-32a).

5. Respondents argue (Weber Br. in Opp. 9-10; Mills Br. in Opp. 17-19) that the government failed to establish that releasing statements such as those at issue here would impair military aircraft safety. However, the government had no obligation in this case to prove that there is a sound empirical basis for the *Machin* privilege; the only issue is whether that privilege was incorporated into Exemption 5. In any event, common sense and the affidavits submitted below (see Pet. 5) support the proposition that witnesses are more likely to be candid when their statements are made under promises of confidentiality. And neither respondents nor the court of appeals have suggested how the government could obtain statistical proof that fewer accidents occur when such promises are given.[5]

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[5]Weber suggests (Br. in Opp. 9-10, 19-20) that the *Machin* privilege is unnecessary because witness statements taken by the National Transportation Safety Board ("NTSB"), which investigates civilian aircraft accidents, are not privileged. This argument, however, has little if any bearing upon the question whether the *Machin* privilege is incorporated into Exemption 5. Moreover, fundamental differences between the NTSB's procedures and those of military investigators make facile comparisons concerning the treatment of witness statements of minimal value. For example, witnesses may be compelled to testify in NTSB investigations (see 49 C.F.R. 845.21(c)), whereas military investigators conducting safety investigations lack authority to subpoena witnesses (see Pet. 5) and must therefore rely upon premises of confidentiality to obtain cooperation. The NTSB's reports may not be used in litigation concerning the accident (49 U.S.C. 1441(e)), and the NTSB is not required to release any document protected under FOIA exemptions (49 U.S.C. 1905). Thus, while statements furnished directly to the

6. Finally, Weber contends (Br. in Opp. 17-19) that incorporation of the *Machin* privilege into Exemption 5 would condone perjury and create the potential for unjust results in civil litigation by concealing potentially important evidence.[6] This, however, is a policy argument against the *Machin* privilege and has little bearing upon the question whether Congress intended to incorporate that privilege into Exemption 5. Moreover, the same objection may be made with respect to all evidentiary privileges. Such privileges exist because in certain circumstances other considerations are thought to outweigh the interest in disclosure of relevant information. In cases like this one, disclosure of the witness statements would result in public access to more information in the short run but, by inhibiting frank disclosure by witnesses, would almost certainly decrease the amount of useful information available for any purpose when future accidents take place. See *Cooper* v. *Department of the Navy, supra*, 558 F.2d at 277.

NTSB may be released, if our interpretation of Exemption 5 is correct, the NTSB would not be required to release the statements involved in this case if supplied to it by the military. 49 U.S.C. 1442(c), upon which Weber relies (Br. in Opp. 19-20), merely requires the military to furnish certain information to the Secretary of Transportation and the NTSB. It says nothing about public disclosure.

[6]This argument, like many of Weber's contentions, is based on Weber's litigation need for the statements at issue. But Weber's rights to the documents "are neither increased nor decreased by reason of the fact that it claims an interest in [them] greater than that shared by the average member of the public." *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 143 n.10.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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